No. 14-915

Supreme Court, U.S.
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IN THE

Supreme Court of the United States

REBECCA FRIEDRICHS, ET AL.,

Petitioners,

v.

CALIFORNIA TEACHERS ASSOCIATION, ET AL.,

Respondents.

On Writ of Certiorari to the
United States Court of Appeals
for the Ninth Circuit

BRIEF *AMICUS CURIAE* OF ATLANTIC LEGAL FOUNDATION IN SUPPORT OF PETITIONERS

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QUESTIONS PRESENTED

California law requires public school teachers to contribute financially to the local teachers' union and that union's state and national affiliates to subsidize expenses the union claims are germane to collective-bargaining, whether or not they are union members. California law also requires public school teachers to subsidize expenditures not related to collective bargaining unless a teacher affirmatively objects in writing every year.

The questions presented are:

1. Whether *Abood v. Detroit Bd. of Ed.*, 431 U.S. 209 (1977), should be overruled and public-sector "agency shop" arrangements invalidated under the First Amendment.

2. Whether it violates the First Amendment to require that public employees affirmatively object to subsidizing nonchargeable speech by public-sector unions, rather than requiring that employees affirmatively consent to subsidizing such speech.

RULE 29.6 DISCLOSURE STATEMENT

Pursuant to Rule 29.6 of the Rules of this Court, *amici curiae* state the following:

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Chicago Teachers Union v. Hudson,
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§ 32992(a). 4, 38
Regs. of Cal. Pub. Emp't. Relations Bd.
§ 32992(b). 4, 39

OTHER AUTHORITIES

Brant, Irving, James Madison: The
Nationalist 354 (1948). 9-10
Daniel DiSalvo, The Union That Devoured
Education Reform, City Journal
(Autumn 2014). 18

Daniel DiSalvo and Stephen Eide, The Union That Rules New York, Manhattan Institute City Journal (Summer 2015).. 20

Diana Furchtgott-Roth and Jared Meyer, Teachers' Unions Throw Students Under the Bus, Economic Policies for the 21st Century (Manhattan Institute, May 7, 2015). 18-19

Gely, Rafael, et al., *Educating the United States Supreme Court at Summers' School: A Lesson on the "Special Character of the Animal"*, 14 Employee Rts. & Emp. Pol'y J. 93 (2010). 24

Jesse McKinley and Elizabeth A. Harris, "A Charter School Rally Duels With Teachers' Unions in Albany," New York Times, March 4, 2015. 17-18

Terry Moe, Special Interest: Teachers Unions and America's Public Schools (2011).. 19

"Terry Moe's, Special Interest: Teachers Unions and America's Public Schools," in Public Interest Institute Policy Study, No. 14-5 (September 2014). 19

Alexander Russo, Teachers Unions and the Common Core, 15 EducationNext (Winter 2015). 18

Valerie Strauss, NY Teachers Union Pulls Its Support from Common Core, Urges Removal of State Ed Chief, The Washington Post (Jan. 26, 2014). 18

Summers, Clyde, *Public Sector Bargaining: A Different Animal*, 5 U. Pa. J. Lab. & Emp. L. 441 (2003). 16, 21

INTEREST OF *AMICUS CURIAE*[1]

Amicus Curiae Atlantic Legal Foundation is a nonprofit, nonpartisan public interest law firm that provides effective legal advice, without fee, to parents, scientists, educators, and other individuals and trade associations. Atlantic Legal Foundation is guided by a basic but fundamental philosophy: Justice prevails only in the presence of reason and in the absence of prejudice. Atlantic Legal Foundation seeks to promote sound thinking in the resolution of legal disputes and the formulation of public policy. Among other things, the Atlantic Legal Foundation's mission is to advance the rule of law in courts and before administrative agencies by advocating limited and efficient government, free enterprise, individual liberty, school choice, and sound science. Atlantic Legal Foundation's leadership includes

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[1] Pursuant to Rule 37.2(a), notice of intent to file this *amicus* brief was provided to the parties and the parties have consented to the filing of this brief, which consents have been lodged with the Court

Pursuant to Rule 37.6, *amicus* affirms that no counsel for any party authored this brief in whole or in part, and no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than *amicus curiae* or their counsel made a monetary contribution to the preparation or submission of this brief.

distinguished legal scholars and practitioners from across the legal community.

The Foundation has litigated several "compelled speech" and "compelled association" cases in the Second and Third Circuits as "first chair" trial and appellate counsel for students at public universities challenging the use of mandatory student fees to fund political speech of organizations with which they disagreed, and as counsel or co-counsel for *amici*, most recently in *Harris v. Quinn*, 134 S. Ct. 2618 (2014).

INTRODUCTORY STATEMENT

Petitioners are public school teachers who resigned their union memberships and object to paying the non-chargeable portion of their agency fee each year, and a non-profit religious organization of educators in public schools. (Brief for Petitioners at ii.)

Respondents are the California Teachers Association; the National Education Association; several local teachers' associations in various California local school districts, and superintendents of various California local school districts.

California Attorney General Kamala D. Harris was an intervenor in the district court proceeding, was an appellee in the court of appeals, and is a party to this proceeding.

Public-school teachers in California are required to make hundreds of millions of dollars in payments to the CTA, the NEA, and their local affiliates. California law makes these payments mandatory for every teacher working in an "agency-shop" school (which includes almost every California public school teacher), whether or not that teacher supports the position CTA takes in collective bargaining and whether the position CTA takes in collective bargaining are directly contrary to the teacher's on-the-job interests.

Petitioners allege that by requiring Plaintiffs to make any financial contributions in support of any union, California's agency shop arrangement violates their rights to free speech and association under the First and Fourteenth Amendments to the United States Constitution," and that by requiring Petitioners to "opt out" to avoid making financial contributions in support of "non-chargeable" union expenditures, the agency-shop arrangement also violates their First and Fourteenth Amendment their rights to free speech and association.

Under California law, a union is allowed to become the exclusive bargaining representative for public school employees in a bargaining unit such as a public school district by submitting proof that a majority of employees in the unit wish to be

represented by the union. Cal. Gov't. Code § 3544(a). Once a union becomes the exclusive bargaining representative within a district, it may establish an "agency-shop" arrangement with that district, whereby all employees "shall, as a condition of continued employment, be required either to join the recognized employee organization or pay the fair share service fee." Cal. Gov't. Code § 3546(a).

California law limits the use of agency fees to activities "germane" to collective bargaining. *Id.* § 3546(b). Public employee unions must estimate the portion of expenses that do not fall into this category for the coming year, based on the non-chargeable portion of a recent year's fee. Regs. of Cal. Pub. Emp't. Relations Bd. § 32992(b)(1). The union must send a notice to all non-members setting forth the agency fee and the non-chargeable portions of the fee. Cal. Gov't. Code § 3546(a); Regs. of Cal. Pub. Emp't Relations Bd. § 32992(a). If non-members do not wish to pay the non-chargeable portions of the fee – the portion of the fee going to activities not "germane" to collective bargaining – they must notify the union within six weeks after receipt of the notice in order to receive a rebate or fee-reduction for that year. Cal. Gov't Code § 3546(a); Regs. of Cal. Pub. Emp't Relations Bd. § 32993(b)

In effect, California law requires every teacher working in most of its public schools to contribute financially to the local teachers' union and its state and national affiliates and to subsidize expenses the union claims are germane to collective bargaining The regime of compelled political speech is irreconcilable with this Court's recognition of the "critical First Amendment rights at stake." *Knox v. Serv. Emps. Int'l Union,* 132 S. Ct. 2277, 2289 (2012) because collective bargaining by public employee unions is itself a species of lobbying and is core political speech. The imposition of compelled support for political speech is irreconcilable with this Court's recognition of the First Amendment rights at stake" in such arrangements. *Id.*

The reasoning of this Court's recent decisions has undermined the intellectual foundation of its earlier approval of compulsory union dues or agency fees, as in *Knox* and *Harris v. Quinn,* 134 S. Ct. 2618 (2014). The cornerstone of the district court's and the court of appeals' decisions in this case, *Abood v. Detroit Board of Education,* 431 U.S. 209 (1977), is "unsupported by either precedent or reason." *Abood* at 245 (Powell, J., concurring in the judgment).

Knox and *Harris*, while recognizing that the "opt out" system that has grown up after *Abood*

does not protect the speech and association rights of non-union members, did not rule on opt-out versus opt-in schemes with regard to "normal" assessments. This Court should, and rule that all opt-out schemes unduly burden the First Amendment rights of dissenting employees.

SUMMARY OF ARGUMENT

Liberty of conscience, protected by the First Amendment, includes the right to be free from compelled support of political activities – including the political activities of public employee labor unions. There is no practical distinction between "bargaining" between public employee unions and government bodies and "lobbying" because even "pure" collective bargaining activities involve the essential political enterprise of allocating government resources and shaping government policies. In the context of teachers' union bargaining with school districts and state education departments, these issues include such matters as teacher pay and benefits, teacher seniority, measurement of teacher effectiveness, measurement of student achievement, teacher promotion, teacher discipline, seniority and lay-off, curricula, length of the school day and of the school year. While each of these matters are related to teacher working conditions and compensation and are legitimate subjects of collective bargaining, they are also of immense bearing on the allocation

of public resources, taxes, public debt and similar issues of political moment.

There is no interest, compelling or otherwise, that justifies the interference with fundamental First Amendment liberties that occurs when dissenting public employees are compelled by law, regulation or contract between third parties to finance the activities of public employee unions, including labor-management collective bargaining negotiations, because those activities involve essentially political decisions about allocating government resources or affecting other governmental activities of concern to the public generally. Prior decisions granting public employee unions the power to compel financial support from dissenting employees inhibits those dissenting employees' First Amendment rights.

Abood, the precedent on which the decisions below rest, is almost four decades old. It is inadequate to protect public employees who do not support public employee unions' political or ideological programs from having their money used to promote policies with which they disagree. The barriers to such dissenters recouping their coerced contributions are high and the procedures needlessly complex, further burdening the employees who do not support the union's activities. The public employee unions – with which the public employer often cooperates – have

overwhelming power vis-a-vis individual employees.

In the past three years this Court has recognized that agency-shop provisions which compel public employees to subsidize public-sector unions' efforts to achieve the unions' favored programs and political actions from state or local officials are a "significant impingement" on employees' First Amendment rights. *See Knox,* 132 S. Ct. 2277, 2289 (2012); *see also Harris,* 134 S. Ct. 2618 (2014).

It is time, we submit, for this Court to recognize explicitly that the notions "labor peace" and fear of "free riders" are insufficient to support infringement of core First Amendment rights, and overrule *Abood* and its progeny.

ARGUMENT

The deduction of money from workers' paychecks by labor unions (or by public employers on behalf of unions) – whether called "dues" or "agency shop fees" – and expenditure of those monies collected from dissenters on both collective bargaining and political activities implicate important issues of free speech, freedom of association, and freedom of choice. Labor unions often complain that restricting their access to such monies diminishes their effectiveness and imposes substantial hardships on them, but this Court's focus should not be on the difficulties faced by

unions when the law compels them to ask permission from workers before taking their money. Instead, the focus must be on the right to choose what to speak and whom to support of individual workers. *See Davenport v. Wash. Educ. Ass'n*, 551 U.S. 177, 187 (2007) ("For purposes of the First Amendment, it is entirely immaterial that [a law] restricts a union's use of funds only after those funds are already within the union's lawful possession. . .What matters is. . . the union's extraordinary state entitlement to acquire and spend other people's money.").

The current system of compulsory agency fees collected from public employees who are not union members is based on decisions of this Court that are irreconcilable with principles underlying First Amendment protections and this Court's more recent First Amendment jurisprudence.

I. THE FIRST AMENDMENT WAS INTENDED TO PROTECT AGAINST COMPELLED SUPPORT FOR POLITICAL SPEECH.

This Court has quoted with approval Thomas Jefferson's statement that "to compel a man to furnish contributions of money for the propagation of opinions which he disbelieves, is sinful and tyrannical."[2] *Abood*, 431 U.S. at 234 n.31. It has

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[2] Irving Brant, James Madison: The Nationalist 354 (continued...)

recognized that the "freedom of speech" guaranteed by the First Amendment "may prevent the government from compelling individuals to express certain views or from compelling certain individuals to pay subsidies for speech to which they object." *United States v. United Foods*, 533 U.S. 405, 410 (2001) (citations omitted). Because "First Amendment values are at serious risk if the government can compel a particular citizen, or a discrete group of citizens, to pay special subsidies for speech on the side that it favors," schemes that compel such subsidies "must pass First Amendment scrutiny." *Id.* at 411.

More recently, this Court recognized the "bedrock principle that, except perhaps in the rarest of circumstances, no person. . .may be compelled to subsidize speech by a third party that he or she does not wish to support." *Harris v. Quinn*, 134 S. Ct. 2618, 2644 (2014) and "compelled funding of the speech of other private speakers or groups presents the same dangers as compelled speech." *Id.* at 2639. In earlier cases this Court recognized that the freedom of expression guaranteed by the First Amendment protects choice in "the decision of both what to say and what not to say," *Riley v. Nat'l Fed'n of the Blind*

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[2](...continued)
(1948).

of N.C., Inc., 487 U.S. 781, 782 (1988), and for that reason has repeatedly upheld the principle that people have the right to refrain from subsidizing messages with which they disagree. *See, e.g.*, *United Foods, Inc.*, 533 U.S. at 410; *Wooley v. Maynard*, 430 U.S. 705, 714 (1977).

"We begin with the proposition that the right of freedom of thought protected by the First Amendment against state action includes both the right to speak freely and the right to refrain from speaking at all." *Id.* (citing *West Virginia State Bd. of Educ. v. Barnette*, 319 U.S. 624 (1943). In *Barnette* the Court established the bedrock principle that the First Amendment protects the *individual's* "free mind" from compulsion by the state, and this interest is paramount. *Id.* at 637, 642.[3]

Scrutiny of compelled political speech about public-policy choices or restrictions on such speech is especially rigorous, *Citizens United v. Federal Election Commission,* 558 U.S. 310, 340 (2010) (citation omitted) because speech concerning public affairs is "the essence of self-government."

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[3] The *Barnette* Court concluded that, "[i]f there is any fixed star in our constitutional constellation, it is that no official, high or petty, can prescribe what shall be orthodox in politics, nationalism, religion, or other matters of opinion or force citizens to confess by word or act their faith therein." *Id.* at 642.

Snyder v. Phelps, 131 S. Ct. 1207, 1215 (2011). Involuntary subsidization of speech must be justified by a "compelling state interest that cannot be achieved through means significantly less restrictive of associational freedoms," *Knox*, 132 S.Ct. 2277, 2289 (2012), quoting *Roberts v. U.S. Jaycees*, 468 U.S. 609, 623 (1984).

This Court has also recognized the central importance of union workers' free speech rights and has held that it would violate the First Amendment for workers' earnings to be taken by the state, and transferred to labor unions for use in promoting political messages with which the workers disagree. *See Lehnert v. Ferris Faculty Ass'n*, 500 U.S. 507, 522 (1991); *Commc'ns Workers of Am. v. Beck*, 487 U.S. 735, 745 (1988); *Abood*, 431 U.S. at 244.

When a state compels its workers to pay union dues or agency fees that support political activities, it is "an infringement of [the workers'] constitutional rights." *Abood*, 431 U.S. at 234. *Abood* applied these principles to invalidate compelled subsidization of ideological or political union speech, but it anomalously created an exception that permits the compelled subsidization of political speech or association in collective bargaining. *Abood*, 431 U.S. at 232. That exception conflicts with other decisions of this Court, is not grounded in sound logic, and permits compelled

political speech that cannot survive First Amendment scrutiny.

The Court in *Wooley v. Maynard*, 430 U.S. 705 (1977) analyzed the license plate dispute in the context of *Barnette*: "We begin with the proposition that the right of freedom of thought protected by the First Amendment against state action includes both the right to speak freely and the right to refrain from speaking at all," *Wooley* at 714 (citing *Barnette*); and "as in *Barnette*," it recognized that the New Hampshire law "forces an individual . . . to be an instrument for fostering public adherence to an ideological point of view he finds unacceptable." *Id.* at 715.

The *Abood* court saw little connection between *Wooley* and *Barnette* and the compelled payment of agency fees. *Abood* cited *Wooley* only once, in a footnote string citation for general First Amendment principles, 431 U.S. at 231 n.28, and referred to *Barnette*'s "fixed star" language only to support its conclusion that unions could not compel non-chargeable contributions for "ideological" causes. 431 U.S. at 235.

Abood can be reconciled with this Court's compelled speech jurisprudence only if public-sector union speech in collective bargaining is not "political" or "ideological" speech designed to "influence government decision-making," *Abood*, 431 U.S. at 231, or if the government's interests in

promoting "labor peace" and preventing "free-riding" justify abridgment of dissenters' First Amendment rights.

In *Abood* the majority implicitly determined that public employees are no different than employees in a private sector bargaining unit. *Abood*, 431 U.S. at 241-42. Justice Powell, joined by Chief Justice Burger and Justice Blackmun, concurred in the judgment, but questioned the Court's suggestion that public employees could be compelled to pay a fee for "bargaining" with the public entity employer. Justice Powell skepticism was correct, because public sector collective bargaining is essentially political activity because it is designed to influence governmental decisions on important public policy issues of general concern, as recognized in *Harris*, *Knox*, and *Abood* itself.[4]

a. Public sector collective bargaining is essentially lobbying activity.

Public employee collective bargaining is, in effect, lobbying carried out in a conference room

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[4] The majority in *Abood* seems to have been ambivalent on this point, because it also acknowledged the "truism" that in the collective-bargaining context, "public employee unions attempt to influence governmental policymaking," and, consequently, "their activities – and the views of members who disagree with them – may be properly termed political." 431 U.S. at 231.

where labor-management bargaining takes place, rather than in public demonstrations, or at political fund-raiser dinners, or in public office-holders' offices, or over a cozy lunch.

Abood held that the First Amendment prohibits the Government from "requiring any [objecting nonmember of a union] to contribute to the support of an ideological cause he may oppose." 431 U.S. at 235, because the "central purpose of the First Amendment was to protect the free discussion of governmental affairs," and that this "fundamental First Amendment interest" was infringed even when nonmembers were "compelled to make [pursuant to agency-shop provisions], rather than prohibited from making, contributions." *Abood* at 231, 234. In *Lehnert* the Court held that "the State constitutionally may not compel its employees to subsidize legislative lobbying or other political union activities outside the limited context of contract ratification or implementation." 500 U.S. 507, 522 (1991) (opinion of Blackmun, J.).

The error in *Abood* is that the majority utilized concepts of "labor peace" and "free riding" from private sector labor relations in the context of public employee union bargaining. Contracts between private employers and unions representing private sector employees are private decisions usually disciplined by market forces. *See*

Clyde Summers, *Public Sector Bargaining: A Different Animal*, 5 U. Pa. J. Lab. & Emp. L. 441 (2003). Errors in financial analysis by the employer regarding the impact of a labor contract – e.g. giving in to extravagant union demands – can lead to the employer going out of business, but any resulting harm to consumers and society at large is tempered because competitors or new firms will continue to provide essential goods or services. *Abood* recognized that a public employer "lacks an important discipline against agreeing to increases in labor costs that in a market system would require price increases," 431 U.S. at 228.

State and local governments are essentially monopolies in the "market" for the provision of certain services, such as public safety, education, public transportation, road maintenance, care for the needy, etc.[5] We do not rely on government as merely one participant in the market.[6]

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[5] In an attempt to shed onerous public employee contracts, and especially the generous fringe benefits public employees were given, some states and municipalities have "privatized" functions that were once deemed to be essential public services, such as sanitation, waste disposal, etc.

[6] Even when a taxpayer opts not to use the government services, the taxpayer must still pay for the public services, including the salaries and fringe benefits of

(continued...)

Government the power to compel payments in the form of taxes so that it can deliver public services. How much government will compel individuals and businesses to pay in taxes and what balance of services it will provide are decisions that are fundamentally political.

In theory, a government official's interest in keeping votes and winning re-election should provide some counterweight against acceding to unsustainable benefits demanded by the union, but often this does not occur. One reason may be that those bargaining for the government are not elected officials, but appointed government emplooyees. Moreover, pubic employee unions are often among the largest contributors to political campaigns, and their sheer size and ability to mobilize committed get-out-the-vote workers and union members and their families as voters give those unions enormous political clout.

In New York, for example, teachers unions take positions and expend enormous sums, on educational issues such as fighting the spread of charter schools (see, e.g., Jesse McKinley and Elizabeth A. Harris, A Charter School Rally Duels

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[6](...continued)
public employees, through taxes; thus when parents choose private school for their children, they still must pay school taxes for teacher salaries and benefits, maintenance of school buildings, and the other costs of the school district.

With Teachers' Unions in Albany, New York Times, March 4, 2015 (available at http://www.nytimes.com/2015/03/05/nyregion/a-charter-school-rally-duels-with-teachers-unions-in-albany.html?, last visited Sept. 5, 2015) and Daniel DiSalvo, The Union That Devoured Education Reform, City Journal (Autumn 2014), (available at http://www.city-journal.org/2014/24_4_uft.html, last visited Sept. 5, 2015); opposing adoption of the "Common Core" *(see, e.g.,* Alexander Russo, Teachers Unions and the Common Core, 15 EducationNext (Winter 2015) (available at http://educationnext.org/teachers-unions- common-core/, last visited Sept. 6, 2015), Valerie Strauss, NY Teachers Union Pulls Its Support from Common Core, Urges Removal of State Ed Chief, The Washington Post (Jan. 26, 2014) (available at http://www.washingtonpost.com/blogs/answer-sheet/wp/2014/01/26/ny-teachers-union-pulls-its-support-from-common-core-urges-removal-of-state-ed-chief/, last visited Sept. 6, 2015); teacher seniority rules, Diana Furchtgott-Roth and Jared Meyer, Teachers' Unions Throw Students Under the Bus, Economic Policies for the 21st Century (Manhattan Institute, May 7, 2015) (available at http://www.economics21.org/commentary/teachers-unions-friedrichs-abood-tenure-court-05-07-2015, last visited September 6, 2015)

Since 1990, the two largest teachers' unions, the American Federation of Teachers and the National Education Association, have spent a combined $114 million on campaign contributions, according to the Center for Responsive Politics. Teachers' unions spent $28 million in contributions in the 2014 election cycle alone. AFT and NEA have also spent $60 million on lobbying from 1998 to 2014. The NEA is the fourth-largest donor in American politics since 1989. *See* Terry Moe, Special Interest: Teachers Unions and America's Public Schools (2011). "By any reasonable accounting, the nation's two teachers' unions, the NEA and the AFT, are by far the most powerful groups in the American politics of education.' The teachers unions have more influence on the public schools than any other group in American society. "Terry Moe's, Special Interest: Teachers Unions and America's Public Schools," in Public Interest Institute Policy Study, No. 14-5 (September 2014) at 4.

Public employee unions have influence far beyond the field of education. Local 1199 of the Service Employees International Union (SEIU) has been called the "union that rules New York because of its "reputation as New York's most formidable organized interest" because of the sheer size of its membership, its spending on campaigns and lobbying, and the depth and breadth of its

connections with New York's ruling elite. Daniel DiSalvo and Stephen Eide, The Union That Rules New York, Manhattan Institute City Journal (Summer 2015)(available at http://www.insideronline.org/summary.cfm?id=25127&mkt_tok=3RkMMJWWfF9wsRohva7JZKXonjHpfsX66uskUa62lMI%2F0ER3fOvrPUfGjI4ATcJnNq%2B, last visited Sept. 6, 2015). Local 1199 has supported numerous causes, including tax increases, gay rights, climate change, and an liberal immigration policy and it has lent support to the recent antipolice protests in New York City and elsewhere. The head of Local 1199 head has "burnished his progressive bona fides, championing tenants' rights, gay marriage, universal health care, and the withdrawal of the U.S. Navy from the island of Vieques, Puerto Rico. *Id.*

The union puts that power to a host of political uses, starting with state-level lobbying, which consumes by far the largest portion of its political budget. State filings show that 1199 and its affiliate, the Healthcare Education Project, have spent $30.7 million over the last decade, a sum that surpasses even the lobbying expenses of a perennial Albany powerhouse, the New York State United Teachers.

Public sector bargaining is a process that concerns the allocation of government resources,

and thus is political. *See* Summers, *supra*, at 443. As the Court in *Harris* explained, "it is impossible to argue that . . . state spending for employee benefits in general is not a matter of great public concern." *Id.* at 2642-43. Such spending necessarily requires either spending less on other public programs or raising additional public revenues – either of which is a core and frequently contentious political issue. Bargaining concessions affecting issues such as wages, merit pay, pensions, hours, benefits, seniority, performance evaluation, employee discipline, and other terms of public employment, the balancing of which affects, for example, the level of public services, priorities within state and local budgets, creation of public debt, and tax rates. *See Abood*, 431 U.S. at 258 (Powell, J., concurring).

Public sector labor contracts are not private decisions. The contract between a political subdivision or agency and the union is itself an instrument of government. Summers, *supra*, at 442. This *Abood* recognized. *See Abood* at 222. *Abood* also recognized that public employee collective bargaining is intended "to affect the decisions of government representatives who are engaged in what is "above all a political process," because decisions in bargaining with the union involve "political ingredients" that require balancing public interests such as the importance

of the service involved with the resources available. *Id.* at 228-29. And, unlike private sector collective bargaining, much of the public employee unions' "bargaining" activity consist of lobbying and electioneering. Indeed, the public employee unions often classify and justify a large portion of their political contributions, cost of electioneering activities, and lobbying expenditures as part of collective bargaining. *See, e.g., Seidemann v. Bowen*, 584 F.3d 104 (2d Cir. 2009).[7]

Given the enormous political power of the modern public-sector union and the often-vast public policy consequences of its collective bargaining activities, requiring a public employee to subsidize the public employee union's activities is materially indistinguishable from the forced subsidization of a political party. "[T]he public-sector union is indistinguishable from the traditional political party in this country." *Abood*, 431 U.S. at 256 (Powell, J., concurring) ; *seen also id.* at 243-44 (Rehnquist, J., concurring) ("I am unable to see a constitutional distinction between

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[7] Justice Blackmun's plurality opinion in *Lehnert* referred to "legislative lobbying" and the "ratification or implementation" of a contract, *Lehnert* at 520-22 (plurality opinion), and his opinion distinguished "collective-bargaining negotiations" from "lobbying, electoral, and other political activities that do not relate to collective-bargaining agreement[s]," *id.* at 521. As we shall show, the distinction is largely artificial.

a governmentally imposed requirement that a public employee be a Democrat or Republican or else lose his job, and a similar requirement that a public employee contribute to the collective-bargaining expenses of a labor union.").

Collective bargaining directly addresses and affects matters of education policy. *See Harris*, 134 S. Ct. at 2655 (Kagan, J., dissenting) (citing *Abood*, 431 U.S. at 263 n.16 (Powell, J., concurring in judgment)). But core public-sector collective bargaining activity affects public policy in ways that are direct, concrete, and often very significant and not merely in the sense that any decision by an elected official affects public resources. As this Court has recognized, a "public-sector union takes many positions during collective bargaining that have powerful political and civic consequences." *Knox*, 132 S. Ct. at 2289. The impact of collective bargaining on matters of public concern is not abstract or theoretical – it has enormous consequences for, among other things, the fiscal health of state and local governments. The decision to raise teachers' salaries or provide generous benefits is a political decision because it will result in either higher taxes, larger public debt, "unfunded mandates," or spending less on other public education inputs such as school facilities, books, or non-teacher services. It also has a broader impact on other public services:

"[p]ublic-employee salaries, pensions, and other benefits constitute a substantial percentage of the budgets of many States and their subdivisions." *Knox*, 132 S. Ct. at 2295.

When one party in the collective bargaining process is a government entity, negotiations are unavoidably about the use of public resources and thus about how elected or appointed officials will govern. In reality, there is no discernable difference between the two types of legislative measures in terms of their effect on employees as employees and employees as citizens and taxpayers. *See* Rafael Gely, *et al.*, *Educating the United States Supreme Court at Summers' School: A Lesson on the "Special Character of the Animal"*, 14 Employee Rts. & Emp. Pol'y J. 93 (2010).

The *Abood* decision fails to appreciate that, during the collective bargaining process, teachers' unions advocate positions on intensely divisive educational policies, some of which – from the perspective of non-member teachers – are harmful to both teachers and students. Under *Abood*, however, nonmember teachers have no choice but to bankroll the very policies to which they strenuously object.

School districts and teachers' unions negotiate discipline, layoff, assignment, and compensation policies, all of which directly affect teachers' professional lives and students' classroom

performance. Most of these issues are the subject of extensive disagreement among members of the teaching profession and in general public discourse. For example, many teachers and other citizens – parents of schoolchildren and others – disagree with teacher discipline, layoff, school or class assignment, and compensation policies that operate exclusively or primarily based on seniority, without regard to teacher performance. These policies, in the minds of many public-school teachers, are antithetical to the teachers' paramount objective of enhancing the quality of education for students.

Despite the strong opposition of many nonmember teachers to the educational policies that teachers' unions espouse, nonmember teachers commonly are compelled by agency shop arrangements to subsidize unions' collective bargaining activities on these matters as a condition of their public employment, even though nonmembers may well have very different views from the unions. These burdens on nonmember teachers' speech rights, countenanced in *Abood*, should be rejected by this Court.

While *Abood* recognized that this principle prohibited compelled funding of union speech directed at "*other* ideological causes not germane to its duties as a collective bargaining representative," it nonetheless allowed compelled

funding of union lobbying in the context of "collective bargaining." *Id.* at 235 (emphasis added). Neither *Abood* nor subsequent cases have articulated any principled basis for distinguishing between collective-bargaining lobbying and non-collective-bargaining lobbying. Rather, *Abood* justified this artificial line solely on the ground that the Court had previously drawn it in the private-sector context in *Railway Employees v. Hanson*, 351 U.S. 225 (1956), and *International Ass'n of Machinists v. Street*, 367 U.S. 740 (1961). *Abood*, 431 U.S. at 232.

This Court has, however, since recognized that the "*Abood* court seriously erred" in concluding that *Street*'s and *Hanson*'s authorization of compelled subsidization of private-sector collective bargaining somehow supported such compulsion in the "very different" public-sector context, in which a "state instrumentality" may directly impose subsidization of collective-bargaining speech that is "directed at the Government" and designed to "'influence the decisionmaking process.'" *Harris*, 134 S. Ct. at 2632-33 (citation omitted).[8] *Street* and

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[8] There is no meaningful distinction between a public employee group lobbying for a salary increase, a business lobbying for a tax credit or exemption, or a taxpayer association lobbying for lower taxes. All of these groups seek to influence the government to adopt their

(continued...)

Hanson, involving private bargaining, do not support *Abood*'s conclusion that compelled subsidization of public-sector collective bargaining is permissible.

b. Collective bargaining affects public policy in ways not meaningfully different from lobbying.

Collective bargaining speech in public employment settings is indistinguishable from "other political or ideological" speech by unions and other groups. Public sector collective bargaining and "political advocacy and lobbying" are both directed at the government, *Harris*, 134 S. Ct. at 2632, and, just like lobbying, bargaining leads to binding commitments from the government on the matters bargained for. As *Abood*, 431 U.S. at 231, recognized, in both cases "public employee unions attempt to influence governmental policy-making." Indeed, "[t]he collective-bargaining agreement to which a public

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[8](...continued)
policy preference and advance their financial goals. There is no basis for granting one group the power to compel financial support for its position from citizens who oppose those policy goals. This Court has recognized that a business corporation's shareholders who dissent from the corporation's lobbying program can dissent by selling their investment from the firm, *First National Bank of Boston v. Bellotti*, 435 U.S. 765, 794 n.34 (1978), but that option is not, under current law, available to public employees with respect to "chargeable" union expenditures.

agency is a party is not merely analogous to legislation, *it has all of the attributes of legislation* for the subjects with which it deals." *Abood*, 431 U.S. at 252-53 (Powell, J., concurring) (emphasis supplied).

This Court's recent decisions recognize that public-sector collective bargaining constitutes core political speech about governmental affairs that is not materially different from lobbying. In *Knox*, the Court found that a "public-sector union takes many positions during collective bargaining that have powerful political and civic consequences." *Knox*, 132 S. Ct. at 2289. *Harris* held that collective bargaining over "wages and benefits" of public employees is "a matter of great public concern," 134 S. Ct. at 2642-43.

This Court has recognized the difficulty of distinguishing between lobbying and bargaining. In *Lehnert*, for example, the plurality opinion held that dissenting employees can be compelled to finance lobbying to win ratification of a negotiated agreement. 500 U.S. 507, 519-20. The plurality tried to distinguish this type of lobbying from other lobbying that might advance the interests of employees more generally, finding that dissenting employees could not be compelled to pay for the latter. *Id.*, at 520. But it is often a difficult line to draw, and, as acknowledged in *Knox*, the unions have often ignored such subtle line-drawing.

c. Use of dissenters' money to fund public sector collective bargaining infringes the dissenters' First Amendment rights.

The "heavy burden" that agency shop arrangements impose on the First Amendment rights of nonmember public-school teachers, *Harris*, 134 S. Ct. 2618, 2643, who are compelled to fund bargaining in which unions advocate policies that the teachers may view as detrimental to their own careers and the success of their students, is incompatible with this Court's First Amendment jurisprudence. In these cases the Court has repeatedly underscored the "significant impingement on [the] First Amendment rights" of nonmember employees, recognizing that it is equally abhorrent to the First Amendment for the government to "compel the endorsement of ideas" as it is for the government to "prohibit the dissemination of ideas that it disfavors." *Knox*, 132 S. Ct. at 2288, 2289.

While *Abood* drew a distinction between union fees used for "political" and "ideological" causes, on the one hand, and "collective bargaining activities," on the other, these recent decisions have exposed the artificiality and unworkability of that division. Indeed, it is no longer open to dispute that a "public-sector union takes many positions during collective bargaining that have powerful political and civic consequences." *Knox*, 132 S. Ct. at 2289; *see also Harris*, 134 S. Ct. at

2632 ("In the public sector, core issues such as wages, pensions, and benefits are important political issues . . . .").

The objections of nonmember teachers to unions' collective bargaining activities with respect to the education policies mentioned above – teacher discipline, teacher evaluation, seniority-based transfers and layoffs, even compensation, as well as academic policies such as the length of the school year and the school day, teaching methods and curricula – are often based on personal political and ideological beliefs, as well as purely professional concerns, including the impact that such activities will have on their professional lives, the well-being of their students, and the success of the public-education system. Thus the freedom-of-speech concerns that prompted the *Abood* Court to condemn compelled subsidies for unions' non-bargaining lobbying activities apply as well to "agency shop" arrangements that compel nonmember teachers to fund unions' collective bargaining activities. Agency shop arrangements coerce public school teachers who choose not to join the union to finance the collective bargaining activities of unions "with which they broadly disagree" on matters of great "public concern." The dissenting nonmembers are compelled to fund advocacy of different positions – sometimes diametrically opposite ones – from those the

nonmembers themselves would articulate. *Harris*, 134 S. Ct. at 2623, 2640.

This is subsidization of "political" speech that affronts the First Amendment.

II. THE INTERESTS IN AVOIDING "FREE-RIDING" AND MAINTAINING "LABOR PEACE" DO NOT JUSTIFY COMPELLED SUBSIDIZATION OF POLITICAL SPEECH.

In *Abood*, 431 U.S. 209, 224-25, the Court upheld the constitutionality of assessing compulsory dues from public-sector workers to finance the collective bargaining expenditures of a labor union, reasoning that the "important" governmental interest in "labor peace" justified the impingement upon dissenting individuals' associational and expressive freedoms. The *Abood* court recognized that the *entire* agency fee implicates individual speech rights: union dues or agency fee funds are being taken, by law, directly from the non-consenting employee's paycheck to fund a form of lobbying and speech directed at the government.[9,10]

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[9] The "free-rider argument" is an "anomaly" that was previously justified by the interest in furthering "labor peace." *See Knox*, 132 S. Ct. at 2290 (quoting *Chi. Teachers Union v. Hudson*, 475 U.S. 292, 303 (1986)). The interest in preventing "free riders" from taking advantage of the benefits of union representation is really subsidiary to maintaining labor peace or some other legitimate interest,

(continued...)

The interest in "labor peace" cannot justify infringement of individuals' core constitutional rights. "Labor peace" means the prevention of the "confusion and conflict that could arise if rival teachers' unions, holding quite different views . . . sought to obtain the employer's agreement." *Abood*, 431 U.S. at 224.

The "free-rider" justification, however, does not reflect the effect of compelling nonmember teachers to fund advocacy for educational policies with which they may strongly disagree, either as a matter of principle or of self-interest. Many teachers are harmed by collective bargaining agreements that give preference to seniority over performance, or that protect ineffective teachers

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[9](...continued)
and is not on its own a "compelling interest." *See, e.g.*, *International Ass'n of Machinists v. Street*, 367 U.S. 740, 7600-61; *Lathrop v. Donohue*, 367 U.S. 820, 879 (1961) *Lathrop v. Donohue*, 367 U.S. 820, 879 (1961) (Douglas, J., dissenting) (discussing *Railway Employees v. Hanson*, 351 U.S. 225 (1956)); *Abood*, 431 U.S. at 220-21, 224; *id.* at 229 (for constitutional analysis, the overriding purpose of exclusive representation is "labor stability").

[10] *Abood* created the chargeable/non-chargeable distinction as the "remedy" for compelled speech inherent in union shop or agency shop arrangement to avoid "free riding" by nonmembers. 431 U.S. at 232-36. This dichotomy establishes a regime that incentivizes unions to categorize as much of their activity as possible as "chargeable," through obfuscation or otherwise.

from effective discipline (many "teachers . . . do not want grossly ineffective colleagues in the classroom," and oppose discipline policies in collective bargaining agreements that protect underperforming teachers because of seniority. *See Vergara v. California*, No. BC484642, slip op. at 12 (Cal. Sup. Ct. Aug. 27, 2014), *available at* http://goo.gl/ThBjNQ).

This Court's post-*Abood* decisions in *Knox* and *Harris* undermine the contention that the governmental interests in promoting "labor peace" and preventing "free-riding" override individuals' core First Amendment rights. This Court made it clear that the free-rider justification articulated in *Abood* is "something of an anomaly" and that "free-rider arguments . . . are generally insufficient to overcome First Amendment objections." *See Harris*, 134 S. Ct. at 2627; *Knox*, 132 S. Ct. at 2289, 2290.

The fact that public *employers* may support the idea of a single union bargaining representative, because they find it convenient to deal with one union rather than many, does not logically support a rule that the government can compel nonmember employees to support that union. Instances in which public employees have withheld support for the exclusive union bargaining representative have not resulted in workplace turmoil or disruption.

As to the supposed deleterious effect on the unions, it is obvious that many groups that depend solely on voluntary contributions, such as charities, are quite successful without compelled financing that infringe First Amendment rights. *See Harris,* 134 S. Ct. at 2641. In *Harris*, the Court, although acknowledging that the union had been an "effective advocate," obtaining "substantially improved" wages and benefits as well as nonfinancial gains for teachers, held that "the mere fact that nonunion members benefit from union speech is not enough to justify an agency fee." 134 S. Ct. at 2640-41, 2636.

The Court should now explicitly hold that the "free rider" rationale is not a sound basis for the exaction by law or agreement between a union and a government entity of compulsory agency fees from public employees.

III. AN OPT-OUT SYSTEM DOES NOT PRESERVE OBJECTORS' FIRST AMENDMENT RIGHTS.

Cases such as *Abood* and *Hudson* "assumed, without any focused analysis, that the dicta from *Machinists v. Street*, 367 U.S. 740, 760 (1961) had authorized the opt-out requirement as a constitutional matter." *Knox*, 132 S. Ct. at 2290. "[A]cceptance of the opt-out approach appears to have come about more as a historical accident than

through the careful application of First Amendment principles." *Id.*

The Court in cases after *Street* tried to distinguish between chargeable and non-chargeable union expenditures and to find constitutionally adequate procedures for dissenting employees to object, but did not rule on the constitutionality of opt-out schemes *per se*. In *Chi. Teachers Union, Local No. 1, AFT, AFL-CIO v. Hudson*, 475 U.S. 292, 303 (1986) the Court assumed that an opt-out procedure was permissible, and prescribed ways in which those procedures must be "carefully tailored to minimize the infringement" of objecting employees' First Amendment rights, holding that a public-sector employee who chooses to pay an agency fee in lieu of joining a union and paying full dues is entitled to "an adequate explanation of the basis for the [agency] fee" that they are required to pay and "a reasonably prompt opportunity to challenge the amount of the fee before an impartial decision maker." *Id.* at 310.

The Court has not considered the more fundamental question whether an opt-out requirement could satisfy First Amendment scrutiny at all until *Knox*: "Although the difference between opt-out and opt-in schemes is important, our prior cases have given surprisingly little attention to this distinction." 132 S. Ct. at 2290.

Knox recognized that those prior cases, by implicitly "permitting the use of an opt-out system for the collection of fees levied to cover nonchargeable expenses . . . approach, if they do not cross, the limit of what the First Amendment can tolerate." *Id.* at 2291. *Knox* reviewed the procedures to protect the rights of dissenting public-sector workers who were charged an "Emergency Temporary Assessment." *Id.* at 2285, 2287 Because "a special assessment billed for use in electoral campaigns" went beyond anything the Court had previously considered, it declined to rely on its prior cases' implicit approval of opt-out schemes for dissenting employees. *Id.* at 2291.

Instead, the *Knox* court reiterated that the First Amendment requires that "any procedure for exacting fees from unwilling contributors must be 'carefully tailored to minimize the infringement' of free speech rights," *Knox*, 132 S. Ct. at 2291 (quoting *Hudson*, 475 U.S. at 303). Rather than presume non-members' willingness to fund a union's political or ideological activities, *Knox* requires their affirmative consent because the courts "do not presume acquiescence in the loss of fundamental rights." *Knox* at 2290 (quoting *Coll. Sav. Bank v. Fla. Prepaid Postsecondary Educ. Expense Bd.*, 527 U.S. 666, 682 (1999)) and a "[u]nion should not be permitted to exact a service fee from nonmembers without first establishing a

procedure which will avoid the risk that their funds will be used, *even temporarily*, to finance ideological activities unrelated to collective bargaining." *Knox*, 132 S. Ct. at 2290 (quoting *Hudson*, 475 U.S. at 305)(emphasis supplied).[11] It applied these principles, to hold that a public-sector union imposing a special assessment or a dues increase "may not exact any funds from nonmembers without their affirmative consent." *Id.* at 2296. There is simply no "justification for putting the burden on the nonmember to opt out of making such a payment." *Id.* at 2290.

The taxonomy of "chargeable" and "non-chargeable" union expenditures and the mechanism for objectors to vindicate their First Amendment rights created by *Abood* and its progeny imposes immense – and unnecessary – burdens on objectors.

In California, the union must send a "*Hudson* notice" to all nonmembers each fall, stating the amount of the agency fee and providing a breakdown of its chargeable and nonchargeable portions. *See Chi. Teachers Union v. Hudson*, 475

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[11] The court in *Seidemann v. Bowen*, 499 F.3d 119, 125–26 (2nd Cir. 2007) observed that the only countervailing interest proffered by the union was its desire "to take advantage of inertia on the part of would-be dissenters who fail to object affirmatively, thus preserving more union members."

U.S. 292, 304-07 (1986); CAL. GOV'T CODE § 3546(a); REGS. OF CAL. PUB. EMP'T RELATIONS BD. § 32992(a). That notice must include either the union's audited financial report for the year or a certification from the union's independent auditor confirming that the chargeable and nonchargeable expenses have been accurately stated. *Id.* § 32992(b)(1). However, the independent auditor does not, however, confirm that the union has properly classified its expenditures. *See Knox*, 132 S.Ct. at 2294. Teachers who opt out are entitled to a rebate or fee-reduction for that year. CAL. GOV'T CODE § 3546(a).

The union must provide adequate "information about the basis for the proportionate share" of union dues to allow fee payers to make an accurate objection to the nonchargeable portions of the dues. *Hudson*, 475 U.S. at 306. The Court in *Lehnert*, 500 U.S. at 519, set out the parameters for deciding what is and is not chargeable and articulated the requirements for evaluating the propriety of a union's determinations with respect to the propriety of a union's chargeability determinations: "chargeable activities must (1) be 'germane' to collective-bargaining activity; (2) be justified by the government's vital policy interest in labor peace and avoiding 'free riders'; and (3) not significantly add to the burdening of free

speech that is inherent in the allowance of an agency or union shop."

The system created by *Abood* and its progeny is unnecessarily cumbersome and substantially burdens objectors' First Amendment rights. Although nominally the onus is on the union to establish that its allocation of expenditures between chargeable and nonchargeable categories, once the union puts forth its numbers and ratios, the burden shifts to the objector to disprove the union's allocation. Disputes between objecting nonmembers and the union often require detailed examination of the union's allocation of expenses between chargeable and nonchargeable categories. In effect either the objector or the court is required to undertake what amounts to a "forensic audit" of the union's accounts (assuming the trial court allows adequate discovery). If the objector has tenacity and resources, he will have to undertake years of litigation and costly discovery. *See Seidemann v. Bowen*, 499 F.3d 119, 128 (2nd Circuit 2007) and *Seidemann v. Bowen*, 584 F.3d 104 (2d Cir. 2009). In that case, a tenured professor of science at a major public university endured more than seven years of litigation, two appeals and two remands to the district court before achieving partial equitable relief and nominal damages – and only then because he was able to enlist the *pro bono* assistance of a major

national law firm and an associate at that firm who had been his protégé as an undergraduate student after commencing the case *pro se*. Few objectors, be they public school teachers or factory workers, would be able to muster similar resources.

It is hard to imagine an objector who has only $350 to $400 annually at stake (see Pet.App.62a) frequently undertaking such Herculean efforts and it is no surprise that objectors are discouraged from seeking refunds. On the other hand, $350 or $400 is a pittance for unions that collect millions of dollars in agency fees and spend millions of dollars on their own political speech. The result is a windfall for the unions. While the harm to the individual objector is significant – amounting to one to two percent of her teaching salary – is not insignificant, a simplified opt-in system would apply only to objectors. If a majority of teachers support the union then it naturally "may be presumed that a high percentage" of those teachers will become "union members" and "willingly pay[] union dues." *Harris*, 134 S.Ct. at 2641. The harm to the union would be negligible.

While *Knox* did not explicitly address regular agency fees that include non-chargeable expenses from non-members, as opposed to temporary emergency dues, the reasoning of that decision logically compels the conclusion that opt-out

schemes, such as California's and those in many other states and localities, are constitutionally untenable.

CONCLUSION

This Court should overrule *Abood* and reverse the decision below

Respectfully submitted,

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